Supreme Court, U.S.
FILED

No. 03-1271 OCT 15 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAIME LARA,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

INTRODUCTION

Mr. Jaime Lara was arrested in Colombia and brought to the United States at its request. In doing so, the United States availed itself of the process of extradition to secure the presence of Mr. Lara in the Southern District of New York, to answer criminal charges set forth in indictment 98 Cr. 1164 (RMB).

During the U.S. Attorney's extradition proceedings against Mr. Lara, the United States forwarded three separate Verbal Diplomatic Notes requesting the arrest of Mr. Lara with the intention to have him extradited. These diplomatic notes were Nos. 963, dated December 7, 1998, 980, dated December 10, 1998, and 1016, dated December 17, 1998. The timing and content of these three communications indicated that the United States government was keenly aware of Colombia's prohibition against extraditing a Colombian national to be prosecuted for acts committed prior to December 17, 1997.

In fact, the United States government's efforts in extraditing and prosecuting Mr. Lara were made with the agreement that Colombia could, and did, limit the scope of Mr. Lara's prosecution to acts which occurred after December 17, 1997, in furtherance of the Casas and Lara-Nausa conspiracy.

This matter was appealed to the United States Court of Appeals, Second Circuit. On appeal four points were raised regarding violations of the doctrine of specialty: (1) evidence of Mr. Lara's criminal activity prior to December 17, 1997 was deemed admissible at his trial; (2) evidence of his criminal activity prior to December 17, 1997 was used in calculating his sentence; (3) evidence relating to his participation in a separate, uncharged conspiracy was used in his sentencing; and (4)Lara could only be sentenced to the maximum term of imprisonment authorized for his crimes under Colombian law. Three of the four points present important federal questions regarding the applicability of the doctrine of specialty to extradition cases which have yet to be resolved by this Court.

Therefore the question before this Court is:

1) Whether the United States may make representations to a nation to induce them to extradite a defendant and then avoid such representations by application of United States procedural or evidentiary rules as well as case law.

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OPINION BELOW

The United States Court of Appeals affirmed the District Court's application of precedent without regard for the representations made by the United States to Colombia in order to Colombia to extradite Jaime Lara. It specifically held that:

> First, it is settled that the doctrine does not alter the procedural and evidentiary rules that apply in United States courts. United States v. Flores, 538 F.2d 939, 945 (2d Cir. 1976). Second, Judge Berman expressly declined at sentencing to consider any evidence of Lara's criminal activity prior to December 17, 1997, a point conceded by Lara at oral argument. Third, as Judge Berman observed, the indictment drew no distinction between Lara's participation in multiple criminal organizations, as Lara now suggests. Finally, although this Court has recognized that an extraditing country may set a maximum term of imprisonment as a condition of extradition, see United States v. Campbell, 300 F.3d 202, 211 (2d Cir. 2002), cert, denied. 123 S. Ct. 2114 (2003), there is no such limitation here, and there is no authority for extending the doctrine of specialty in the manner Lara urges.

STATEMENT OF JURISDICTION

(i) The appellant was prosecuted in the United States District Court for the Southern District of New York for violation of 21 U.S.C. 812, 952(a) and 960(b)(1)(a) as well as 21 U.S.C. §§841(a)(1) and (b)(1)(A). The alleged indictment alleged criminal acts to have been committed by the defendant within the confines of the Southern District of New York.

(ii) The Court of Appeals has appellate jurisdiction over this matter, as the district court has entered a final judgement of conviction and the appellant is entitled to take an appeal as of right under 18 U.S.C. §3732 and the Federal Rules of Criminal Procedure.

(iii) A timely notice of appeal was filed in the district court on June 20, 2002, the same day as the judgement of conviction was entered.

(iv) The basis for the jurisdiction herein is the review of a United States Court of Appeals, Second Circuit decision which was mandated on July 17, 2003.

CONSTITUTIONAL PROVISIONS

The points presented in this petition for writ of certiorari are important federal questions regarding the applicability of the doctrine of specialty to extradition cases which have yet to be resolved by this Court.

STATEMENT OF THE CASE

Defendant-Appellant JAIME LARA appeals from the July 17, 2003 affirmation by the United States District Court, Second Circuit, of a judgment of conviction entered in the United States District Court for the Eastern District of New York (Berman, J.) convicting him after a plea of 21 U.S.C. 812, 952(a) and 960(b)(1)(a) (Count One) as well as 21 U.S.C. §§841(a)(1) and (b)(1)(A)(Count Two).

On June 12, 2002, appellant was sentenced under the Sentencing Reform Act to a term of imprisonment of 327 months. Timely Notice of Appeal was filed on June 20, 2002. Mr. Lara is currently incarcerated and serving his sentence.

ARGUMENT IN SUPPORT OF PETITION

After Mr. Lara was indicted, the United States government moved to have him extradited from Colombia. In support thereof, Assistant United States Attorney Richard Daddario and Detective Edmond O'Dea of the New York Police Department/Drug Enforcement Administration Task Force submitted sworn affidavits regarding the basis of the charges pending against Mr. Lara. As is clearly written, the government considered Mr. Lara an integral member of the "La Senora" organization. Law enforcement also considered Mr. Lara an integral member of the "La Senora" organization as reflected by Detective O'Dea sworn statement.

By Verbal Diplomatic Communication No. 963, (hereinafter Communication 963), dated December 7, 1998, the United States asked the Colombian Ministry of Foreign Relations to arrest Jaime Lara. The United States was fully aware of the fact that the extradition reform act entered into on December 17, 1997, which amended article 35 of the Colombian Constitution of 1991, the Colombian Criminal Procedure Code and the principles of international law governed their request.

Between Colombia and the United States there is no formal reciprocal extradition treaty in effect. Extradition of Colombian nationals, although forbidden in 1991 by Colombian Constitutional article 35, was subsequently authorized by Legislative Act No.1 which

went into effect December 17, 1997. Legislative Act No.1 states, "the extradition of Colombians by birth will be granted for crimes perpetrated in a foreign country which are considered as such by the Colombian legislation," and that "Extradition will not be granted when it involves acts committed before the enactment of this regulation," quoting the Supreme Court of Justice's decision. Aside from being authorized by legislative decree, extradition from Colombia, in the absence of a reciprocal treaty, is governed by several articles of the Colombian Penal Code.

The United States government continued to provide the requisite details in compliance with its understanding of its responsibility pursuant to Colombian Constitutional Law, the Colombian Penal Code and international law principles. Communication 963 set forth the charges against Mr. Lara; the fact that a warrant had issued for his arrest; the facts supporting the case against him; his description and requested that Colombia effect the arrest of Mr. Lara and seize from him any articles he may have on his person at that time.

On December 10, 1998, the Embassy of the United States through Verbal Diplomatic Communication No. 980, (hereinafter "Communication 980"), knowing the prohibition set forth in the extradition reform act of December 17, 1997, did clarify the request to arrest Mr. Lara as follows:

In addition to the facts of the case

> previously provided in the above-mentioned diplomatic note, the United States Government would like to clarify and emphasize the fact that the indictment which forms the basis for this request is based, in part, on actions and events, that took place subsequent to December 17, 1997. These, include the receipt, in June 1998, by Jaime Orlando Lara of the proceeds of narcotics sales; Jaime Orlando Lara's presence at a meeting in June 1998 in Queens County, New York, in which he asked questions about whether other members of the smuggling organization had been arrested and, Jaime Orlando Lara's participation in telephone conversations during July 1998, in which he discussed the transportation of narcotics and United States currency.

It is unknown whether the clarification and limitation set forth in this communication is in response to a formal request for clarification from the Colombian government.

Logically, Communication 980 appeared to be a response to an inquiry by the Colombian authorities, but it could not be unequivocally stated that the communication was not sua sponte in order for the United States to adhere to the strict requirements of Colombian law. Regardless of the basis for this clarification, the Colombian judiciary and

justice department relied on the representations of the United States through its communications.

The Legal Office of the Ministry of Foreign Affairs forwarded to the Colombian Attorney General's office the communications from the United States, and the Attorney General approved the request to arrest Mr. Lara by decree dated December 10, 1998. Mr. Lara was arrested on December 11, 1998, by the Colombian National Police, Dijin, the personal property he had on his person was seized and he remanded to their national penitentiary, "La Picota."

Seven days after Mr. Lara's arrest, the United States government sent Verbal Diplomatic Communication No. 1016, dated December 17, 1998. Since the time of his arrest, and until the moment of his extradition from Colombia to the United States, the issue of the propriety of Mr. Lara's extradition was hotly litigated in Colombia.

Said Colombian litigation yielded numerous decrees, as well as a decision and order from the Colombian Supreme Court of Justice, dated November 9, 1999, legally permitting the extradition of Mr. Lara and resolutions numbered 86 and 89, dated November 10 and 20, 1999, respectively, from the Colombian Ministry of Justice and Law authorizing his extradition to the United States. The office of the Colombian Attorney General, through written communication O.J.E. 061145, dated December 21, 1998, decreed that since there was no

agreement in place, the Colombian Code of Criminal Procedure would dictate the procedure to be followed.

The court considered in detail, the arguments made by Mr. Lara's Colombian counsel, as well as the United States' compliance with the conditions set forth in the applicable Colombian Penal Law. The conditions which had to be fulfilled in order for Colombia to extradite Mr. Lara to the United States were:

i. Formal validity of the documentation submitted.

ii. Full proof of the identity of the person whose extradition is requested.

iii. Concurrence of the double incrimination principle

iv. Equivalence of order issued abroad, and

v. Fulfillment of what has been established in public treaties, if it corresponds.

Having concluded its analysis, the court issued a formal favorable ruling permitting the extradition of Jaime Lara, ***only*** for acts committed after December 17, 1997, and referred the matter to the Ministry of Justice and Law to take whatever actions were necessary to comply with its decree.

Having received a favorable ruling from the court,

the Colombian government, through its Ministry of Justice and Law, granted the extradition request of the United States. On November 10, 1999, the Ministry of Justice and Law issued its first resolution, numbered No. 86 authorizing the extradition of Jaime Lara. Having stated the conditions subject to which Jaime Lara was being extradited, the Ministry of Justice and Law, resolved in salient part that:

1. Mr. Lara should be extradited to the United States to stand trial for the charges set forth in indictment 98 Cr.1164, "for acts allegedly committed after the enactment of Legislative Act No. 01 of 1997," which limited said prosecution to acts occurring after December 17, 1997, only; and

2. "To advise the requesting State that the person being extradited may not be made to stand trial and may not be sentenced for a prior act different from the one that gave rise to this request."

Mr. Lara's Colombian counsel availed himself of the statutory right to appeal the resolution of the Ministry of Justice and Law and immediately filed an appeal.

On November 20, 1999, the Ministry of Justice and Law, in response to counsel's appeal issued its second resolution, Resolution No. 89, authorizing the extradition of Mr. Lara. The decision addressed the various points raised by Mr. Lara's counsel, rejected the same, and

ratified Resolution No. 86 in total. Thus, Mr. Lara's extradition was to be solely for the purposes of trying him for the acts set forth in the United States extradition request as limited by its own Communication No. 980 with the understanding that the maximum he could receive as a sentence was limited to the Colombian maximum for the equivalent crime, namely a maximum of 10-15 years. On November 21, 1999, Mr. Lara was extradited from Colombia to the United States, by way of Miami to New York. The instant prosecution ensued..

The District Court, applying precedent, held that the evidentiary and procedural rules of the United States applied to the case with consideration of the representations made by the United States to Colombia, thereby nullifying the representations. The District Court also applied precedent to avoid prosecuting Mr. Lara for the specific acts which the United States represented were the basis upon which he was being prosecuted.

The District Court relied on the precedent case of the United States v. Flores, 538 F2d. 939 (2d Cir. 1976), to dismiss the defense's argument that the rule of speciality must necessarily limit the evidence to be introduced against Mr. Lara. Flores, was crystal clear in its holding that evidence antedating a statute for which a defendant may be subsequently prosecuted is admissible "as long as the conspiracy subject to trial has continued into the permissible prosecutorial period and an overt act in furtherance of the conspiracy has been committed during

that period." Flores spoke of the existence of a ***single*** ongoing conspiracy evidence of which may be introduced to show "the existence and purpose of the conspiracy and the significance of later behavior, . . . and to show the existence and purpose of the conspiracy, as well as to prove the intent and purpose of the conspirators' later acts."

Flores went on to discuss the actual purpose of the doctrine of speciality within this context. Specifically the court wrote:

> The international doctrine of specialty, upon which Flores relies, cannot provide him with support, since that doctrine does not purport to regulate the scope of proof admissible into evidence in the judicial forum of the requisitioning state. Instead, the doctrine has more modest roots. In United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), the Supreme Court established as a judicially enforceable principle of our domestic law that an extradited defendant may not be charged and tried for crimes not enumerated in the applicable extradition treaty. See also Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315 (1933). This later was carried further to provide that even if the treaty specifies

> crimes for which the defendant may be criminally responsible, prosecution for such offenses will be barred if the asylum state did not grant extradition for such crimes. Johnson v. Browne, 205 U.S. 309, 27 S.Ct. 539, 51 L.Ed. 816 (1907). Consequently, in modern times most of our attention has been directed to deciding whether certain offenses which the government seeks to prosecute fall outside the contemplated scope of the foreign sovereign's extradition decree. See, e.g., Shapiro v. Ferrandia, 478 F.2d 894, 905—08 (2d Cir. 1973); Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir.), cert denied, 409 U.S. 1059, 93 5.Ct. 552, 34 L.Ed.2d 511 (1972).

The other cases upon which the District Court based it denial of the introduction of certain evidence were United States v. Monsalve at 173 F.3d, 847, the United States v. Berger, 224 F.3d 107 (2nd Cir. 2000) and the United States v. Graham, 91 F.3d 213 (D.C. Cir. 1996). Although on its face the District Court's reliance on these cases may seem appropriate, in doing so the Court eviscerated the Colombian decrees and participated in the government's end run around the bargain it struck with Colombia.

The extensive litigation conducted in Colombia to ensure that its citizen was protected was of no consequence

if the United States avoided the Colombian orders by relying on precedent without regard for the uniqueness of the particular case at hand. This case is unique because it straddled the effective date of the Colombian judicial decree. The requesting state did not criminalize an act which was legal until such date but rather, was granted the ability to request that Colombia submit its citizens to extradition for acts committed subsequent to a particular date.

Based on the foregoing it is respectfully submitted that the District Court's reliance on the various cases was completely misplaced. The defense did not seek to preclude evidence of an ongoing conspiracy which antedated December 17, 1997, and continued into the time period for which Mr. Lara was prosecuted.

Rather, the defense sought to preclude this evidence because it was evidence of certain offenses which the government sought to prosecute which fell outside the contemplated scope of the foreign sovereign's extradition decrees. The government's documentation in support of the extradition request, and all the decisions rendered by the Colombian judiciary and government authorizing the extradition request, spoke of Mr. Lara's conduct post December 17, 1997, pertaining to the Lara-Nausa conspiracy only.

The Court of Appeals, Second Circuit affirmed the District Court's application of the various precedent

without regard for the representations of the United States. The lower Court having violated the language, as well as the spirit, of the Colombian decrees, this Court must now reconsider it precedent and find that it is inapplicable to this particular situation.

Respectfully submitted,

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APPENDIX

SDNY/NYNY
98-CR-1164
BERMAN

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of June, two thousand and three.

PRESENT: HON. ROGER J. MINER,
HON. DENNIS JACOBS,
HON. JOSE A. CABRANES,

Circuit Judges.

UNITED STATES
COURT OF APPEALS
FILED
JUN 24 2003
ROSEANN B.
MACKECHNIE, CLERK
SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,
Appellee.

v. 02-1370

JAIME LARA, aka "Jimmy",
Defendant-Appellant

- X

-ISSUED AS MANDATE: 7-17-03-

APPEARING FOR DEFENDANT-APPELLANT:

J. ROBERTO CARDENAS, Cardenas & Associates, New York, NY.

APPEARING FOR APPELLEE:

RICHARD C. DADDARIO, Assistant United States Attorney, for James B. Comey, United States Attorney for the Southern District of New York (Andrew J. Ceresney, of counsel), New York, NY.

Appeal from the United States District Court for the Southern District of New York (Berman, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Defendant-Appellant Jaime Lara appeals from a judgment of conviction entered on June 12, 2002, in the United States District Court for the Southern District of New York (Berman, J.), following his guilty plea to conspiring to import and distribute more than one kilogram of heroin, in violation of 21 U.S.C. §§ 846, 943. Lara was sentenced principally to 327 months of imprisonment.

Lara's chief contention on appeal is that the district court proceedings violated the international law doctrine of "specialty." Lara's entry into an unconditional guilty plea prior to trial waived any nonjurisdictional challenges to his conviction, Lebowitz v. United States, 877 F.2d 207, 209 (2d Cir. 1989), but an objection grounded on the doctrine of specialty amounts to an objection to the district court's jurisdiction, see United States v. Rauscher, 119 U.S. 407, 429-33 (1886). Lara therefore may raise the issue on appeal.

The doctrine of specialty is "a principle of international law that prohibits a defendant from being tried on charges other than those for which he was extradited." United States v. Levy, 25 F.3d 146, 159 (2d Cir. 1994). Following his indictment, Lara was extradited to the United States from Colombia pursuant to an agreement between the two nations that Lara was being extradited "only in relation to acts committed after December 17, 1997," the effective date of Colombia's extradition law. Lara argues that some of the overt acts alleged in the indictment to be in furtherance of the two charged conspiracies occurred before December 17, 1997.

Lara identifies four violations of the doctrine of specialty: (1) evidence of his criminal activity prior to December 17, 1997 was deemed admissible at his trial (which was never held because of Lara's guilty plea); (2) evidence of his criminal activity prior to December 17, 1997 was used in calculating his sentence; (3) evidence

relating to his participation in a separate, uncharged conspiracy was used in his sentencing; and (4) Lara could only be sentenced to the maximum term of imprisonment authorized for his crimes under Colombian law.

First, it is settled that the doctrine does not alter the procedural and evidentiary rules that apply in United States courts. United States v. Flores, 538 F.2d 939, 945 (2d Cir. 1976). Second, Judge Berman expressly declined at sentencing to consider any evidence of Lara's criminal activity prior to December 17, 1997, a point conceded by Lara at oral argument. Third, as Judge Berman observed, the indictment drew no distinction between Lara's participation in multiple criminal organizations, as Lara now suggests. Finally, although this Court has recognized that an extraditing country may set a maximum term of imprisonment as a condition of extradition, see United States v. Campbell, 300 F.3d 202, 211 (2d Cir. 2002), cert, denied. 123 S. Ct. 2114 (2003), there is no such limitation here, and there is no authority for extending the doctrine of specialty in the manner Lara urges.

We have reviewed Lara's additional arguments concerning his sentence, and conclude that they lack merit.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

Roseann B. MacKechnie,
Clerk of the Court

BY: Lucille Carr